No. 88-932

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FOREST HILLS EARLY LEARNING CENTER, INC., ACADEMY DAY CARE, INC., AND HOLLOMAN CHILD CARE CENTERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
(202) 828-5300
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Do child care centers subject to state licensing requirements have standing to challenge a statute exempting church-run centers from those requirements as an establishment of religion?

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 1979, Virginia enacted a statute that exempts all "child care center[s] operated or conducted under the auspices of . . . religious institution[s]" from compliance with the licensing requirements of Virginia Code § 63.1-196. Va. Code § 63.1-196.3 (1979). Under that enact-

ment, a church-run center can exempt itself from the licensing standards by filing a statement of intent to operate an exempt child care center and documentary evidence that it has satisfied certain limited health, safety and fire code requirements and specified staff-child ratios. Church-run child care centers that meet these criteria need not comply with the overwhelming majority of licensing standards applicable to non-exempt centers.

On February 1, 1980, plaintiffs, three non-sectarian child care centers operating under licenses issued by the state, brought this action seeking a declaration that, *inter alia*, the exemption of church-run child care centers from the state's licensing requirements constitutes an establishment of religion and a denial of equal protection of the laws.[1] The Director of the Department of Social Services of the Commonwealth of Virginia ("the state") defended the exemption as a permissible accommodation of potential free exercise claims of church-run child care centers. No exempt church-run center sought to intervene at that time.

Shortly after plaintiffs filed their complaint, the state moved to dismiss the entire action—including plaintiffs' Establishment Clause claim—for lack of standing. The district court granted the motion because it concluded that plaintiffs' claim of injury depended upon speculation. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 487 F. Supp. 1378 (E.D. Va. 1980). On appeal, the Fourth Circuit concluded that plaintiffs' standing to raise their Establishment Clause and Equal Protection Clause claims could be predicated on financial harm and remanded to allow plaintiffs to amend their complaint and to substantiate their allegations of financial harm by affidavit.

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[1] An earlier action filed in September 1979 was dismissed. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 480 F. Supp. 636 (E.D. Va. 1979).

Forest Hills Early Learning Center, Inc. v. Lukhard, 642 F.2d 448 (4th Cir. 1981) ("*Forest Hills I*").

After plaintiffs amended their complaint, supported by affidavits, the district court denied the state's renewed motion to dismiss for lack of standing. See Order, Aug. 4, 1981. Plaintiffs' subsequent motion for summary judgment, seeking a declaration that the exemption statute violated, *inter alia*, the Establishment Clause of the United States Constitution, was substantiated by the affidavits of Margaret D. Miller, James A. Payne, Frederick Glantz, Paul Boyd, Inez Holloman and Stephen Jones. These were the same affidavits that had supported plaintiffs' standing allegations concerning injury, and they formed a part of the factual record that the Fourth Circuit subsequently found sufficient to entitle plaintiffs to summary judgment. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 244-45 (4th Cir. 1984) ("*Forest Hills II*").

On April 22, 1982, on cross-motions for summary judgment, the district court held that the exemption for church-run child care centers had a secular purpose of accommodating potential free exercise claims and thus did not violate the First Amendment. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 540 F. Supp. 1046 (E.D. Va. 1982).

On February 7, 1984, the Fourth Circuit vacated the district court's order granting summary judgment in favor of the state and remanded the action for further proceedings in accordance with its opinion. *Forest Hills II*, 728 F.2d at 247. The court held that "[t]he exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it"—the accommodation of free exercise rights of the exempted centers. *Id.* at 244.

The court concluded that plaintiffs were entitled to the entry of summary judgment. However, the court was

reluctant to direct entry of judgment in their favor without determining whether and to what extent free exercise rights justifying the exemption, in whole or in part, did in fact exist. Since there was no evidence in the record bearing on that issue, the court remanded to permit "further evidentiary proceedings . . . devoted to developing . . . the extent of any free exercise rights had by the sectarian institutions in the exempted activities, and the nature and extent of any compelling state interest in nevertheless regulating those activities." *Id.* at 246. The court "conditionally" denied plaintiffs' request for judgment and remanded the action for the limited purpose of inviting exempt centers, none of which had theretofore sought to intervene, to intervene as a class.

The court directed that if church-run centers failed to satisfy the criteria for a class action or if a class were certified but failed to show the existence of any specific free exercise rights that would be infringed by specific child-care regulations, "the exemption should be declared wholly unconstitutional." *Id.* at 246.

On remand, a group of four churches, petitioners Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church, and The Rock Church ("the intervening churches"), moved to intervene on behalf of a class of church-run centers. Only two other exempt centers filed affirmative responses to the district court's notice, but neither of those centers filed motions to intervene.

The intervening churches filed a motion to certify a class on October 19, 1984. They asserted that the alleged class—all centers that had obtained or filed for exemptions—shared a common belief that a child care program is an integral part of the church ministry, and that any state regulation of a church-run child care center violates the free exercise of religion. On January 17, 1985, the trial court ruled that there was no basis upon which a class could be certified. Accordingly, the court entered

judgment in favor of plaintiffs. At no time on the first remand did the state or the intervening churches challenge plaintiffs' standing.

On appeal, the state and the intervening churches challenged the merits of the district court's order but did not attack plaintiffs' standing. The Fourth Circuit ruled that the district court, in granting summary judgment in favor of the plaintiffs, had "denied . . . [the intervening churches] any right to class certification or an opportunity to conduct discovery, or to present evidence." It thus remanded the proceeding a second time for the purposes stated in its first opinion. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 789 F.2d 295, 297 (4th Cir. 1986) (*"Forest Hills III"*).

On remand, the churches joined in a motion to dismiss for lack of subject matter jurisdiction challenging plaintiffs' standing to sue on one or more of their claims. The motion to dismiss for lack of subject matter jurisdiction was denied on November 24, 1986.

After a hearing on petitioner Grace Baptist Church's motion to certify a class, the district court certified a class on January 9, 1987. The matter was tried on March 9, 1987. After post trial briefing and argument, the district court ruled that plaintiffs had demonstrated injury to support their standing, entered judgment in their favor and declared the exemption statute unconstitutional. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300 (E.D. Va. 1987).

On May 6, 1988, the Fourth Circuit affirmed the district court's ruling on standing, relying on *Arkansas Writers' Project, Inc. v. Ragland*, —— U.S. ——, 107 S. Ct. 1722, 1726 (1987). The Fourth Circuit reviewed on the merits and held the exemption did not violate the Establishment Clause.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Court should review and reverse the Fourth Circuit's ruling on standing. They argue that the ruling below constitutes an unwarranted extension of *Arkansas Writer's Project* by granting "standing" to parties who have not suffered injury and who do not fall within the prudential "zone of interests" protected by the Establishment Clause. Petitioners are wrong on both counts. Plaintiff-respondents established in preliminary proceedings and on summary judgment that Virginia's disparate treatment of licensed and exempt centers caused them injury. As a group directly affected by Virginia's differing treatment of non-religious centers, plaintiffs clearly fall within the zone of interests protected by the Establishment Clause.

I. Plaintiffs' Standing Was Resolved in 1981.

Shortly after plaintiffs filed this action in February 1980, the state moved to dismiss the complaint for lack of standing. The district court granted the motion because it found that plaintiffs' claim of injury depended upon speculation. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 487 F. Supp. 1387 (E.D. Va. 1980). On appeal, the Fourth Circuit concluded that plaintiffs' standing to raise their Establishment Clause and Equal Protection Clause claims could be predicated on financial harm and remanded to allow plaintiffs to support their allegations by affidavit. *Forest Hills I.*

After plaintiffs amended their complaint and substantiated their allegations by affidavit, the district court denied the state's renewed motion to dismiss for lack of standing. See Order, August 4, 1981. The non-exempt centers' motion for summary judgment, seeking a declaration that the exemption statute violated, *inter alia*, the Establishment Clause of the United States Constitution, was supported by affidavits of Margaret D. Miller, James

A. Payne, Frederick Glantz, Paul Boyd, Inez Holloman and Stephen Jones, the same affidavits that support plaintiffs' standing allegations concerning injury. Those affidavits formed a part of the factual record that the Fourth Circuit found sufficient to entitle plaintiffs to summary judgment. *Forest Hills II*, 728 F.2d at 233, 244-45. As the district court noted when it found that the exemption statute violated the Establishment Clause, a court would not be willing to grant summary judgment to plaintiffs unless they had successfully satisfied standing requirements in both preliminary proceedings and on summary judgment.

The elements for establishing standing were fully satisfied in this case, as both the district court and the court of appeals concluded. Had the state felt that plaintiffs' evidentiary support for its standing allegations was insufficient to support summary judgment in their favor, it should have opposed plaintiffs' motion for summary judgment and cross-moved on that issue. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 689 (1973) (if defendant thought standing allegations untrue, it "should have moved for summary judgment on the standing issue") *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473, —— U.S. ——, 108 S. Ct. 376, 385-86 (1987); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 n.15 and 46 n.25 (1976); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 526 (1st Cir. 1979). Since the state did not controvert plaintiffs' evidentiary support for their standing allegations on summary judgment, plaintiffs' standing was fully established at that point.

The result reached in *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980), a case cited by petitioners, is instructive. There, the original defendants "did not challenge the factual or legal basis for [plaintiffs'] stand-

ing either in their motion to dismiss or in their opposition to [plaintiffs'] motion for partial summary judgment." 608 F.2d at 1333. The appellants, who were permitted to intervene for purposes of appeal, challenged plaintiffs' standing on appeal. The Ninth Circuit ruled that although "the record would be substantially more complete had appellant been called upon to marshall the facts and law in support of standing in response to a timely challenge to standing," the record was sufficient to support standing. *Id.*

Here, the facts in support of standing are stronger. The state *did* challenge plaintiffs' standing. Plaintiffs *were* required to marshall facts and law to support their contentions in opposition to a motion to dismiss and in support of a motion for summary judgment. The Fourth Circuit subsequently determined that the facts presented by plaintiffs were sufficient to support summary judgment in plaintiffs' favor, and only refrained from directing the entry of judgment in their favor to permit churches to show that free exercise rights supported the exemption. *Forest Hills II*, 728 F.2d at 246-47.

Plaintiffs' standing was not questioned between August 1981, when the district court denied the state's second motion to dismiss, and November 1986, when the churches resurrected the issue on the second remand. The issue was not raised on the appeal decided in *Forest Hills II*, on the first remand after the churches intervened or on the appeal resolved in *Forest Hills III*.

Plaintiffs—who had established that they were entitled to judgment *unless* the exempt centers demonstrated that the child care standards would violate their free exercise of religion—should not be required to relitigate issues with parties that entered the case four years after it began. Petitioners—whose intervention at such a late stage was made possible solely by the Fourth Circuit's invitation to present *their* free exercise claims—are not

free to relitigate issues that were previously resolved or to raise issues beyond the scope of the remand.[2]

II. Plaintiffs Have Standing to Challenge the Exemption As An Impermissible Establishment of Religion.

The Fourth Circuit correctly held that plaintiffs have standing to challenge the exemption statute's constitutionality, consistent with this Court's criteria for standing. They have suffered both religious and economic injury sufficient to establish standing. It is beyond dispute that anyone whose adherence or non-adherence to religion is used to justify disparate government action has standing to challenge that action. As Justice O'Connor has stated, "the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *See Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring.) As the state and churches have observed, the central purpose of the Establishment Clause is to insure government neutrality in matters of religion. *Gillette v. United States*, 401 U.S. 437 (1971). By enacting

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[2] Even if the scope of the remand had not been expressly confined by the Fourth Circuit, the churches are precluded from relitigating issues resolved before their intervention. As that court has stated, "an intervenor is held to take the case as he finds it." Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders' Ass'n, 646 F.2d 117, 122 (4th Cir. 1981). An intervenor is not free to challenge prior orders or judgments. *See, e.g.*, Paradise v. Prescott, 585 F. Supp. 72, 75 n.4 (M.D. Ala. 1983), *aff'd*, 767 F.2d 1514 (11th Cir. 1985), *aff'd sub nom. United States v. Paradise*, 480 U.S. 149 (1987). Rather, he is bound by the "law of the case" doctrine. Gindes v. United States, 740 F.2d 947 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984); Dickinson v. Auto Center Mfg. Co., 733 F.2d 1092, 1096 (5th Cir. 1983); Mid-Eastern Electronics, Inc. v. First National Bank, 455 F.2d 141, 143 (4th Cir. 1970). As intervenors who have entered this proceeding following several appeals, the churches are bound by the law of the case regarding plaintiffs' standing. Capital Investors Co. v. Estate of Morrison, 584 F.2d 652, 654 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

the exemption statute, Virginia decided to treat church-run child care centers differently from centers that are not affiliated with a religious institution, even if licensed centers, such as plaintiff Holloman's, provide religious training. This differential treatment was clear to the Fourth Circuit. In 1984, it found:

> that the non-exempt centers had to do no more than hold up the challenged exemption for judicial scrutiny to demonstrate its palpable, facial, non-neutrality in respect of religion; the exempted activities are, by definition, only those of 'religious institutions' and the substantiality of the degree of favor conferred upon religion in relation to non-religion is equally palpable.

Forest Hills II, 728 F.2d at 241 (footnote omitted). The disparate treatment imposed on licensed centers and the substantial degree of favor conferred upon religious centers is precisely the kind of injury that supported standing in cases such as *Arkansas Writers' Project, Inc. v. Ragland*, —— U.S. ——, 107 S. Ct. 1722, 1726 (1987); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); and *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

In *Arkansas Writers Project*, for example, the Court held that non-exempt magazines had standing to challenge a statute granting a sales tax exemption granted to other similarly situated magazines. 107 S. Ct. at 1726. The Court emphasized that "we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant [in numerous cases]. *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638 104 S. Ct. 2620, 81 L. Ed. 540 (1984); *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)." *Id.*

Similarly, in *Valley Forge*, the Court concluded that standing may be predicated on *either* economic injury or "spiritual injury." The Court's indication that "spiritual injury" would confer standing in no way limits standing to plaintiffs claiming such injury. Rather, it serves to emphasize that "*injury* of *any* kind, economic or otherwise, [is] sufficient to confer standing." 454 U.S. at 486 (emphasis in text, footnote omitted). The Court in *Valley Forge* was concerned only that a plaintiff demonstrate more than an interest shared with all citizens that a state faithfully adhere to the Constitution. *Id.* at 482.

Here, plaintiffs are not simply citizens concerned in the abstract with Virginia's adherence to the Constitution. They are within the group directly subjected to disparate government treatment as a direct consequence of their lack of religious affiliation. Thus, they have a special and far greater interest in challenging the exemption than citizens having only an abstract concern with the state's faithful adherence to the Constitution. They clearly fall within the zone of interests protected by the Establishment Clause. *See Valley Forge Christian College*, 454 U.S. at 482.

Moreover, a favorable decision for plaintiffs would remedy their injuries. If the statute were declared unconstitutional, the palpable non-neutrality present on the face of the statute would be eliminated. All child care centers, regardless of religious affiliation, would then be treated by the state in the same manner, as they had been for more than thirty years before the exemption was enacted. Thus, as determined seven years ago, plaintiffs have standing to challenge the constitutionality of the exemption statute.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
(202) 828-5300
Counsel for Respondents